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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 499.

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

P. B. SULLIVAN, DOING BUSINESS AS ALBERTA COAL SALES COMPANY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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Respondent.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's statement (Petitioner's Brief, pp. 2-6) is substantially a full and correct one.

All italics in this brief are ours unless otherwise stated.

ARGUMENT.

POINTS RELIED UPON.

The express provisions of the Interstate Commerce Act required petitioner to publish and charge a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations thereof in the United States.

Conformable to the provisions of the Act, petitioner published and collected a charge which the Interstate Commerce

Commission has found was, as applied to respondent's shipments, unjust and unreasonable.

The charging by petitioner of an unjust and unreasonable rate for the transportation of respondent's freight was a violation of the Interstate Commerce Act which damaged respondent, within the meaning of the provisions of the Act, and entitled respondent to a judgment against petitioner for the amount of that damage without specific proof of pecuniary loss.

The amount of respondent's damage is measured by the difference between the unjust and unreasonable charge exacted and the charge found just and reasonable by the Interstate Commerce Commission, with interest upon the total amount of such difference. Specific proof of pecuniary loss is unnecessary.

The Commission has always held that it might consider the reasonableness of one or more factors of a through rate or charge for a through movement without considering the through rate or charge as a whole, in a reparation case, if a carrier participating in the through movement or a portion of the through charge is not within its jurisdiction or is not subject to the provisions of the Act to Regulate Commerce.

I.

The Express Provisions of the Interstate Commerce Act Required Petitioner to Publish and Charge a Just and Reasonable Rate for the Transportation of Respondent's Freight From the International Boundary to the United States Destinations Thereof.

The Interstate Commerce Act, section 1, subdivisions (1), (2) and (5); section 6, subdivision (1) (U. S. Code Annotated, title 49, sections 1, 6), provide:

"Section 1. (1) That the provisions of this Act shall apply to common carriers engaged in

(a) The transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation * * * takes place within the United States.*

(2) The provisions of this Act shall also apply to such transportation of * * * property * * * *but only in so far as such transportation * * * takes place within the United States.*

(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 6. (1) That every common carrier *subject to the provisions of this Act* shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates * * * and charges for transportation between different points on its own route. * * *

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, *as defined in this Act,* unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for *such transportation* of passengers or property, or for any service in connection therewith, between the points

named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Respondent's position is fully sustained by:

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1323.

In *News Syndicate Co., supra*, the Court said:

"The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. * * * It was the duty of defendants in error to establish just and reasonable rates for that service. * * * *The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act.* * * *"

In *Lewis-Simas-Jones Co., supra*, the Court said:

"While the Act does not govern the joint through international rate, the demand for reparation is grounded on the claim that the maintenance of that rate participated in by the American carrier and *its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination*, operated to compel payment of the charges based on the excessive joint rate."

It was, therefore, petitioner's duty to publish and apply a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations of the freight in the United States.

II.

Petitioner Has Published and Collected a Charge Which the Interstate Commerce Commission Has Found Was When Exacted Unjust and Unreasonable.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Interstate Commerce Commission found (R., 35-37):

> "Upon all the facts of record we find that, as applied to the Canadian coal to which this proceeding relates and for both single-line and joint-line hauls, the rates assailed were, are, and for the future will be unjust and unreasonable to the extent that they have exceeded or may exceed the rates per ton of 2,000 pounds set forth in the sub-joined table for the respective distances shown and which we find to be the maximum reasonable rates for application to the transportation of the traffic in question."

Petitioner, as required by the Act, published a charge, applicable to the transportation of respondent's shipments, from the international boundary to the destinations thereof in the United States. This charge the Interstate Commerce Commission found to be unjust and unreasonable and, therefore, in violation of the provisions of Section 1 of the Act.

No attack is made by petitioner upon the propriety of this finding by the Commission. It does not question the unreasonableness of the rate from the boundary to United

States destinations. Its attack is solely that the Commission did not find unreasonable the entire through charge.

What petitioner has to say in the paragraph beginning near the bottom of page 9 of its brief, is not a proper matter for consideration by this Court. Petitioner has not attacked the sufficiency of the evidence to sustain the finding of the Commission regarding the reasonableness of the rates; and has not included, in the record, any of the evidence presented to the Commission.

III.

Petitioner's Unjust and Unreasonable Charge for Transporting Respondent's Shipments Was a Violation of the Act Which Damaged Respondent.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Interstate Commerce Commission found (R. 36):

> "We further find that complainants and the Monarch Elevator Company, intervener, made shipments under the rates herein found unreasonable and paid or bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued or would accrue at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

In section 1, subdivision (5) of the Interstate Commerce Act, it is required that

> "(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and un-

reasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

In the *News Syndicate Co. case, supra*, and the *Lewis-Simas-Jones Co. case, supra*, the Court held that it was the duty of defendants in error to establish just and reasonable rates for the transportation from the international boundary to destinations in the United States.

Throughout the history of common carrier law, long before the enactment of the Interstate Commerce Act, and ever since, it has never been questioned that the payer of an unjust and unreasonable rate is damaged to the extent the charge collected exceeds a just and reasonable rate.

Specific proof of pecuniary loss has never been considered necessary.

Petitioner surely does not assert the contrary.

Mecker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

Lewis-Simas-Jones Co. vs. Southern P. Co., 283 U. S. 654, 75 L. Ed. 1333.

"If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the defendants were entitled, as for other torts, to compensation from the wrongdoer."

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184.

Southern P. Co. vs. Darnell-Taenzer Lbr. Co., 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186.

Prior to the enactment of the Transportation Act, 1920 (c. 91, Sections 400, 41 Stat. 474), the words "but only so far as such transportation * * * takes place within the United States," did not appear in Section 1 of the Act

to Regulate Commerce. Those words were inserted by that Act.

Unless the specific purpose of the amendment was to cover a case of the exact sort here presented, and to permit an award of reparation in the manner in this case determined by the Commission, it is difficult to understand its purpose.

Both before and since the amendment, the Commission has held it has the fullest power to regulate in every respect the participation by carriers within its jurisdiction in joint rates with foreign carriers and to award reparation against the American carriers to the amount such rate is found to be unreasonable.

Both before and since the amendment, the Commission has held that if the domestic carrier names a local or proportional rate for its portion of the transportation, instead of participating in a joint rate, it is responsible only for its own rate, cannot be held in anyway responsible for the rates, practices, or conduct of foreign carriers, and that the Commission may not concern itself to any extent whatsoever with such foreign rates and carriers.

Arizona Lumber & Timber Co. vs. Arizona Eastern Ry. Co., 96 I. C. C. 203.

The effect of the amendment is to require the domestic carrier to publish and maintain, when it participates in foreign commerce, a rate for its portion of the transportation—that occurring in the United States.

Why require the separate publication of the domestic component of the rate in such cases, if the reasonableness of the full through charge must nevertheless, in every instance, be considered and determined by the Commission in each case?

Apparently the only reasonable purpose attributable to Congress when it made the amendment is that it intended

to completely disassociate the domestic portion of international commerce from the foreign portion thereof and to eliminate all administrative and other difficulties therefrom by giving the Commission a rate basis within its admitted jurisdiction free from all uncertainties; conflicts of jurisdiction with foreign tribunals, and differences of opinion respecting rates between such tribunals, etc., etc.

As the matter now stands, the Interstate Commerce Commission may, exclusively, determine all matters relating to the domestic portion of international rates; and the corresponding Canadian Board may determine all questions relating to the Canadian portion of such rates. There can no longer be conflicts of authority, twilight zones, or differences of opinion where one tribunal holds a rate reasonable and the other holds it unreasonable.

IV.

THE AMOUNT OF RESPONDENT'S DAMAGE IS MEASURED BY THE DIFFERENCE BETWEEN THE UNREASONABLE CHARGE EXACTED AND THE CHARGE FOUND REASONABLE BY THE COMMISSION, WITH INTEREST ON THE TOTAL AMOUNT OF SUCH DIFFERENCE. SPECIFIC PROOF OF PECUNIARY LOSS IS UNNECESSARY.

When a carrier has exacted an unreasonable rate, the payer is damaged in the amount the exaction exceeds the reasonable rate with interest.

> "The carrier concedes, as it must under *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 62 L. Ed. 451, P. U. R. 1918 B, 598, 38 Sup. Ct. Rep. 186, that a recovery for excessive freight charges can be had under section 1 without specific proof of pecuniary loss,

and that the measure of damages is the amount of the excess exacted."

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

New York, N. H. & H. R. Co. vs. Ballow & Wright (C. C. A. 9th Circuit), 242 Fed. 862, 155 C. C. A. 450.

In *Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Commission said (R. 34):

"We further find that complainants * * * made shipments under the rates herein found unreasonable and paid and bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued * * * at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

V.

THE COMMISSION HAS ALWAYS HELD THAT IT MIGHT CONSIDER THE REASONABLENESS OF ONE OR MORE FACTORS OF A THROUGH RATE OR CHARGE FOR A THROUGH MOVEMENT WITHOUT CONSIDERING THE THROUGH RATE OR CHARGE AS A WHOLE, IN A REPARATION CASE, IF A CARRIER PARTICIPATING IN THE THROUGH MOVEMENT OR A PORTION OF THE THROUGH CHARGE IS NOT WITHIN ITS JURISDICTION OR IS NOT SUBJECT TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

Petitioner's contention in this regard is: (1) "In order to recover for the violation of the Act by a common carrier a shipper must show that he has sustained damages in consequence of such violation"; and that (2) "A finding by the

Commission holding that one factor of a through rate was unreasonable and specifying the extent of such unreasonableness is not sufficient evidence to support a judgment for damages sustained on a shipment that was transported on the through rate" (Petitioner's Brief, p. 6).

The foregoing statement of principle which petitioner emphasizes throughout its brief is the exception rather than the rule followed by the Commission. The Commission has applied the principle claimed by petitioner only in cases where all carriers involved in a through movement and all rates making up the through charge are within its jurisdiction and subject to the provisions of the Act to Regulate Commerce. The Commission has never applied the rule otherwise.

Commission's Power Over Foreign Rates and Carriers.

With respect to its power over rates applicable to foreign commerce, the Commission has held:

(1) The Commission's authority over rates, rules, regulations and practices of inland carriers applies as well to import as to export traffic (*Boston Wool Trade Assn. vs. Atchison, T. & S. F. Ry. Co.,* 83 I. C. C. 445).

The Commission has no jurisdiction of ocean rates. It must deal with the export and import rate differential question as though the ports were destinations instead of gateways (*Chamber of Commerce of New York vs. New York Central and H. R. R. Co.,* 24 I. C. C. 55).

Its jurisdiction over import traffic attaches at ports of entry (*Philip Carey Mfg. Co. vs. Grand Trunk Western Ry. Co.,* 36 I. C. C. 203).

(2) The Commission has no jurisdiction when the excessive charges complained of accrue solely in the local rate

component of the connecting line in a foreign country and which is operated as a separate road (*Arizona Lumber & Timber Co. vs. A. E. R. R. Co.*, 96 I. C. C. 203, 206); nor to determine whether rates have been lawfully established under the laws of a foreign country (*Greene Cananea Copper Co. vs. Director General*, 80 I. C. C. 1210); nor to prevent foreign carriers from withdrawing their participation in joint rates or to prevent their cancellation upon such withdrawal (*Petroleum and its Products to Canadian Points*, 128 I. C. C. 545).

Canadian railways are not required by law to file tariffs with the Commission showing rates between points in Canada or the conditions which govern such rates (*Grain Rates in United States and Canada*, 142 I. C. C. 755).

The factor of a combination rate applying over a line wholly within Canada and not on file with the Commission is not subject to the Commission's jurisdiction (*Cutler-Hammer Mfg. Co. vs. Director General*, 88 I. C. C. 600, modified 92 I. C. C. 9).

(3) The Commission is without jurisdiction to require the establishment of joint through rates to points in Canada (*United Paper Board Co. vs. Canadian National Rys.*, 74 I. C. C. 733); but it can prohibit (*Sand and Gravel from Canada*, 83 I. C. C. 460) or require, the domestic railroad joining in such rates to cancel its concurrence therein (*United Paper Board Co. vs. Canadian National Rys.*, 74 I. C. C. 733), and to cease from participating in rates which unduly prefer Canadian points (*Maritime Assn., Boston Chamber of Commerce, vs. Ann Arbor R. Co.*, 95 I. C. C. 539).

(4) The Commission having no power to prescribe such joint rates for a service not wholly within the United States,

it is also without power to prescribe their divisions (*New England Divisions*, 126 I. C. C. 579).

(5) The Commission's authority over transportation to or from an adjacent foreign country is over that portion within the confines of the United States (*International Nickel Co. vs. Director General*, 66 I. C. C. 627).

As to rates constructed on combination such factors as apply wholly within the United States are subject to its jurisdiction (*Washington Publishers' Assn. vs. Algoma Central & H. B. Ry. Co.*, 104 I. C. C. 4).

When the Commission considers through rates, made up of combinations of separate factors, applicable to transportation occurring entirely within the United States, it has jurisdiction and complete control of the several carriers concerned and of their respective rates. It can, and does, in such cases, determine the reasonableness of the through rate and of the factors comprising it and directs its order to such carriers and to such rates as violate the Act.

If in such a case the through rate is unreasonable, the Commission may make it reasonable by correcting all or some of the components, and even if reasonable it may correct unreasonable components.

The situation is entirely different with a similarly constructed rate from Canada. The Commission has no jurisdiction of the Canadian carriers nor of the components of the through rate applicable for the transportation over those lines (*Arizona Lumber & Timber Co. vs. Arizona Eastern Ry. Co.*, 96 I. C. C. 203). It can direct no order to them for any purpose either to regulate or control the character of their conduct or to determine the reasonableness of their rates (*Id.*).

Nor can the Commission in the latter case compel repre-

sentatives of Canadian railroads to appear before it with respect to rates between points in Canada, or the conditions which govern such rates (*Grain Rates in United States and Canada*, 142 I. C. C. 735).

In the case of a domestic through rate, the Commission requires the complaint to be directed to the entire rate, and not a single component thereof and requires all participating carriers to be parties defendant (*State Com. of New Mexico vs. A. T. & S. F. Ry. Co.*, 123 I. C. C. 675). In the case of the Canadian transportation, as has been seen, this cannot be required or done.

When Commission Has Not Considered Through Rate.

Moreover, it has never been the practice of the Commission in the case of export, or import, rates to consider the entire through charge when determining the reasonableness of the portion of the rate applicable in the United States (*Henry Marble Co. vs. B. & O. R. R. Co.*, 146 I. C. C. 414, 169 I. C. C. 311; *Mundet & Son vs. Lehigh Valley R. Co.*, 177 I. C. C. 573, 576); nor, even in the case of an exclusively domestic rate, has the Commission considered the through rate where a part of the through charge is a factor imposed by a carrier not subject to its jurisdiction and whose rates are not on file with it, as, for example, in the case of rail-lake-and-rail transportation (*Lake Cargo Coal Rates, 1925*, 126 I. C. C. 309, 313, 314), nor, in the case of a shipment from Canada where the rate imposed was a Canadian proportional plus a joint rate from a Canadian junction point to the United States (*Cutler-Hammer Mfg. Co. vs. Director General*, 88 I. C. C. 600, 92 I. C. C. 9); nor in the case of Ex-River or Ex-Tide-water Shipments (*Cheney Bros. vs. South Manchester R. Co.*, 147 I. C. C. 421, 428).

"The record shows that the rates charged by the rail carriers from the mines to the lower lake ports are not related to the charges beyond. That is to say, any one of the several separate charges may be changed without affecting the others, and as a matter of fact the charges for the water haul have fluctuated greatly in recent years without affecting the rail charges. Tariffs for the water haul and the other services performed in connection with the transportation of the coal after it has been delivered by the rail lines to the vessels at the lower lake ports until it is again accepted by the rail lines for transportation from the upper lake ports to interior points are not filed with this Commission and it has never exercised jurisdiction over the individuals or companies performing such intermediate services. The haul to the lake ports is unquestionably a part of a through movement and because of this fact the rate may well be different from that for a purely local movement to the same ports, but the proposition to consider the entire distance the traffic moves does not, in the absence of a specific through rate, appeal to us as reasonable, for to apply this principle would, as the total distance increases, finally result in lessening the differential until the rate to the lake ports from all the districts would be the same, and to carry it to its logical conclusion would require that rates to the lower lake ports be established with relation to the final destination of the coal. So far as the respondent carriers are concerned, their connection with the transportation of lake cargo coal ends when the coal is delivered to the vessels at the lower lake ports and they have no interest in the charges beyond the ports save to the extent that the amount of such charges may affect the movement of the traffic. We

must therefore deal with the charges for the services which they perform, separately and distinctly from any other charges or any other services."

Lake Cargo Coal Rates, 46 I. C. C. 159, 185.

Moreover, the principle decided in *Southern P. Co. vs. Darnell-Taenzer Lbr. Co.*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, should prevent petitioner from looking beyond the situation created or caused by its own rate and the respondent with whom it deals. It has no right to reduce its own liability by receiving a credit thereon from an alleged inadequate Canadian rate. The process cannot be reversed and petitioner made to respond to respondent if petitioner's rate is reasonable and otherwise according to law and the unlawfulness lies in the foreign factor of the rate.

Commission Considered Through Rate.

When the Commission considered the domestic portion of the rate involved in this case, it necessarily considered the rate as a whole and, to some extent, at least, gave consideration to the reasonableness and measure of that whole rate or charge. The Commission has long held that a proportional rate is a part or remainder of a through rate and, as such, must be considered in relation to the whole rate. (*Southern Kansas Grain and Grain Products Association vs. Chicago, Rock Island and Pacific Ry. Co.*, 146 I. C. C. 700, 702.) (*Boney & Harper Milling Co. vs. A. C. L. R. Co.*, 28 I. C. C. 383.) (*Export Rates on Grain and Grain Products*, 31 I. C. C. 616.)

This is what the lower court adverted to when it said:

"If, as argued by the defendant, the rate from the point of origin to the international boundary may have been very low, still we must assume that the Commis-

sion considered the rate in question as a part of the through rate. The contention now made may well have been urged before the Commission, and we may presume that it was so urged."

In *Alberta Coal Sales Co., et al. vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Interstate Commerce Commission found (R. 35-37):

"* * * We find that, as applied to the Canadian coal to which this proceeding relates and *for both single-line and joint-line hauls*, the rates assailed were, are, and for the future will be unjust and unreasonable * * *."

Burden of Proof and Presumptions.

Moreover, in the absence of proof to the contrary, the presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life; and, hence, in the absence of a showing to the contrary, the rates of carriers are presumed to be lawful rates. (*Interstate Commerce Commission vs. Chicago, G. W. Ry. Co.*, 109 U. S. 108, 119, 52 Law Edition 705; *Allan & Lewis vs. Arizona R. & N. R. R. Co.*, 106 Federal 265; *Shloss-Sheffield Steel & Iron Co. vs. Louisville & N. R. Co.*, 51 I. C. C. 635.)

If this be true and the Canadian rate is to be presumed to be a lawful one, the finding that the United States portion of this international rate was excessive necessarily carried with it the finding that the through charge was excessive.

Whether this be true or not, it suggests a practical and appropriate method of handling these situations if the Canadian rate must always be passed on. If it is pertinent

and relevant in a case such as that here presented, to consider the through charge when the domestic portion of the rate is shown to be unreasonable, the burden of making the showing should fall upon the carrier which will benefit from the showing, and which, presumably, is better informed regarding the status of the Canadian rate.

If the reasonableness of the Canadian rate is relevant either alone or as a factor of a through rate that showing is clearly a matter of defense to be shown by the carrier suing to avail itself of the defense;—especially where that carrier has violated the provision of the Interstate Commerce Act.

A very unfair situation will arise if any other method of handling the matter is adopted. If the domestic factor of the rate is reasonable and the foreign factor unreasonable, the Interstate Commerce Commission can do nothing and the shipper or consignee of freight in this country can only turn to the Canadian tribunals for relief. If the American factor is excessive and the Canadian factor is inadequate in such manner as to offset that excessiveness, nothing can be done on either side of the border. The only case where any relief can be obtained is the single case where the Canadian factor is explicitly found to be reasonable and the American factor to be unreasonable, but, in all three of the instances suggested, the American tribunals must enter upon a determination of the reasonableness of the Canadian rate under the most difficult and impracticable circumstances.

The Interstate Commerce Commission has held in several cases that where carrier claims that it has complied with the law in publishing a factor applicable to the domestic portion of the transportation, it has the burden of proving this. By analogy, the same duty should exist in a case where

it claims that the Canadian factor of the rate is so low as to make the through charges reasonable, notwithstanding an excessive domestic rate.

> "While not admitting that the joint rate assailed was or is unreasonable, defendants say, in substance, that if it were unreasonable, we would nevertheless here be without power to award reparation. The gist of their argument is that the right to an award of reparation by us in such cases as this must be founded, in part, at least, on a failure of the carriers to maintain a rate for the transportation from the origin points in the United States to the international boundary; that the instant record is silent as to whether or not such a rate existed; and that the burden of showing the non existence of such rate was on complainants. It is true that nothing is stated of record as to the existence or non-existence of a rate to the boundary, but if such rate existed, the burden of bringing forward evidence thereof was on defendants. *Lewis, etc., Co. vs. Southern Pac. Co.*, 283 U. S. 654."
>
> *Mount Royal Rice Mills vs. Southern Pac. Co.*, 186 I. C. C. 469.

"As a matter of pleading, a complainant, alleging the exaction of an unreasonable international joint rate, should not be required to anticipate the carriers' defense and negative or seek to avoid it. In such a case, if the carriers have published a rate from the border, an orderly procedure would require them to plead it. Heretofore, a complaint alleging the charging of an unreasonable joint through rate has been deemed sufficient. The very liberal method of pleading and practice, built up for the disposition of matters delegated to this Com-

mission, should not be disregarded except for the most compelling reasons."

Amsden vs. Canadian National Rys., 176 I. C. C. 259.

If an international rate must be considered as a whole, under circumstances such as those existing in this case, respondent should be deemed to have made a *prima facie* case when he shows petitioner violated the provisions of the Interstate Commerce Act.

In passing, it may be said that carriers have, since the amendment to the Act to Regulate Commerce in 1920, made a number of attacks upon the Commission's jurisdiction with respect to the domestic portion of the international rates:

"Defendants contend that we lack jurisdiction to pass upon the lawfulness of the joint rates assailed because part of the haul is through a foreign country, and because rates were published and maintained for transportation within the United States to and from the international border.

"The United States lines, defendants herein, having elected to participate in joint rates from and to the points considered, we hold we have jurisdiction to determine the lawfulness of the rates applied despite the mere publication concurrently of rates to and from the border which were not applied to the transportation here involved."

Hardy v. Galveston, H. & S. A. Ry. Co., 169 I. C. C. 790.

VI.

General Answer to Miscellaneous Points.

The fact that the shipments involved in this case "moved under through bills of lading executed at the Alberta points of origin covering the movement to the destinations in North Dakota" (Petitioner's Brief, p. 2), is immaterial.

Minnesota vs. Blazius, 290 U. S. 1.

Petitioner states in its brief (p. 3):

> "In the proceeding before the Interstate Commerce Commission the respondent alleged only that the proportional rates applicable from the international boundary to the destinations in North Dakota were unjust and unreasonable. No complaint was made respecting the proportional rates from the origins in Alberta to the international boundary nor the through rates from the origin in Alberta to the destinations in North Dakota that resulted from the combination of these proportional rates. * * * The Commission made no finding with respect to the reasonableness of the proportional rates from the origins in Alberta to the international boundary nor of the resulting through rates from such origins to the North Dakota destinations."

The Interstate Commerce Commission has frequently held that it has no jurisdiction over rates applicable only in a foreign country or over carriers performing transportation only in a foreign country. Had complainant complained of the Canadian proportional rates, it must have made the Canadian carriers defendants. There was, and is, no authority in the Interstate Commerce Act, which explicitly limits its operation to so much of the transportation as takes place in the United States, by virtue of which complainant could

serve the Canadian carriers with process or otherwise compel them to respond as defendants before the Interstate Commerce Commission.

Arizona Lumber & Timber Co. vs. Arizona Eastern Ry. Co., 96 I. C. C. 203.

An international rate may consist of a joint rate or of a through rate made up of separate factors or components. Such through rate may consist of a proportional rate to and from the border; a proportional rate to the border and a local rate beyond; two local rates or any other combination of proportional and/or local rates.

Where the rate is a joint single factor rate, there is no method by which the several interests therein of the several participating carriers can be segregated and separately examined. The ascertainment of their divisions in the joint rate is not sufficient to permit this. All that can be done is to consider the single factor rate as a unit and if it is unreasonable, award reparation against the carrier. Unless this be done, there would be no relief or redress to a domestic shipper in the case of an unreasonable single factor joint international rate.

Probably Congress had in mind the difficulty thus indicated in a joint international rate when, in 1920, it amended section 1 of the Act to Regulate Commerce so as to require domestic carriers to publish a rate for so much of the transportation as takes place in the United States. By so doing, Congress ascertains the charge made for the domestic transportation and permits the Commission to regulate, control it and determine its reasonableness under that Act. It prevents the domestic carrier from profiting from inadequate Canadian rates and from charging more than would otherwise be reasonable and proper.

If petitioner's contention is correct that all international rates made up of separate factors must, if reparation is to be awarded, be considered as a total charge and not solely with respect to the domestic component, the Commission will be required in every case where it finds the domestic portion excessive to determine the reasonableness of the Canadian factor of the rate. This it has always in the past held it has no right to do; that it has no jurisdiction of the carriers or of the rate. It is plain that after it has determined that the rate is excessive or inadequate, it can do nothing to correct the situation. This also means that, in many instances, after the Commission has determined that the domestic rate is excessive, it might find the Canadian rate reasonable and thus have been compelled to perform an unnecessary and useless thing in passing on the reasonableness of the Canadian factor.

It is also likely that there will be frequent instances where the Commission's determination of the reasonableness of the Canadian factor will not be in accord with the determination of the same question by the Canadian tribunal having jurisdiction of Canadian rates.

There are also serious practical and administrative factors. Canadian rates are not made or based upon the same conditions or considerations as are American rates. (*Grain Rates in United States and Canada*, 142 I. C. C. 755, 758, 762.) The tariffs in which those rates are published are not filed with the Interstate Commerce Commission, the accounts of the Canadian carriers are not subject to its jurisdiction, and those accounts are not available as are the accounts of American carriers, the officers of Canadian roads are not subject to subpoena and cannot be required to come to the United States to testify, and, in many other respects, the proof of the unreasonableness of a Canadian rate in the

United States is surrounded with substantial difficulties. In fact such that in all cases not of substantial importance complainant will be discouraged and prevented from proceeding in the face of such obstacles and difficulties.

It would seem logical to assume that Congress, when it amended section 1, in 1920, intended to eliminate all such questions from the consideration of the Interstate Commerce Commission and to leave the question of reasonableness of rates on each side of the border to the tribunal of the country in which the rate is published and applied, and that it intended to make the domestic factor of an international rate independent of and entirely disassociated with any other rate.

Meyer, Commissioner, dissenting in a case involving an international rate, summarized the situation:

> "I can not concur in reversing division 4 for reasons stated in the original report of the division, 151 I. C. C. 207. In my judgment, what it is now proposed to do can not be done without performing one or more of the following unlawful acts:
>
> 1. To legislate for a foreign country by—
>
> 2. Passing upon the reasonableness of rates in a foreign country when we have no authority to take evidence and to inform ourselves regarding the facts customarily relied upon in establishing reasonable rates.
>
> 3. To carry into a foreign country our United States standards of reasonableness and to apply them there.
>
> Situations like those presented by the instant case can be fully met, without raising doubtful legal and constitutional questions, by requiring carriers to publish rates to and from international boundaries. The present record affords a sufficient basis for such a finding and for an order carrying such finding into effect. I am author-

ized to say that Commissioner Woodlock concurs in this expression."

Cyanamid and Cyanide from Niagara Falls, 155 I. C. C. 488.

In the same case the comments of Atchison, Commissioner, also dissenting, are interesting and pertinent.

VII.

The conclusion reached by the Court below was right. Its judgment should be affirmed.

Minneapolis, Minnesota, January 26th, 1935.

Respectfully submitted,

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